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The NAS Report: An Evidence Professor's Perspective*Jules Epstein, Esquire*

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It is unlikely that the National Academy of Sciences intended that its February 18 report, "Strengthening Forensic Science in the United States," would provide a template or source for litigating admissibility claims in particular criminal cases. The Report's focus was global - to call for systemic improvements to the forensic disciplines and sciences, with emphasis (*inter alia*) on the research needed to validate expert claims of individualization and identity.

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Nonetheless, the Report's findings call into question the degree of certainty testified to by practitioners of "soft" forensic disciplines, the subjective pattern matching of fingerprints, ballistics, handwriting, tool marks, and tire and shoe print treads. In particular, the Report found an across-the-board inability to validate claims that a correspondence of features between crime scene evidence and a known (e.g., between a latent print left at a burglary and the print of a suspect) proves that the suspect was the sole possible contributor.

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As the Report emphasized, "[w]ith the exception of ... DNA, no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source." Absent from the traditional forensic disciplines was a "body of research...to establish the limits and measures of performance and to address the impact of sources of variability and potential bias...Such research ... seems to be lacking in most of the forensic disciplines that rely on subjective assessments of matching characteristics."

For the Congress and other policy makers, these conclusions support an intensive research regime; but the findings present more immediate and pragmatic concerns for judges, prosecutors and defense attorneys in pending or soon-to-be-charged criminal cases. Do forensics experts continue to offer testimony that "this fingerprint came from this defendant to the exclusion of all others? Must courts await a new body of research; or do these findings require action now?

From an evidence perspective, the NAS report raises an abundance of questions and procedural issues. This Article proceeds with an outline of what legal and practical matters we can now expect to see raised in courtrooms.

In a Daubert Jurisdiction: Because the Daubert inquiry is fundamentally one of evidentiary reliability, there is no bar to asking a court to revisit prior decisions of admissibility. Thus, even where a court has previously approved "individualization" or source attribution testimony from a fingerprint or ballistics expert, there is no bar to seeking a new admissibility hearing.

At such a proceeding, the court will have to determine whether the NAS report warrants a reassessment of the qualifications threshold for individual experts.¹ Even if that threshold is identified and determined to be satisfied in a particular case, the court will have to determine under Daubert or under Rule 403² what degree of conclusion an expert may testify to:

- that the fingerprints "match?"
- that they have numerous similarities with no noticeable points of exclusion?
- that they "probably" come from the same person?

This parsing of expert opinion began even before the NAS report. Illustrative is *United States v. Glynn*³, which summarized an earlier holding:

Valenti could not testify that ballistics was a "science," nor could he claim that he reached his conclusions to any degree of "certainty," whether "ballistic certainty" or otherwise... The Court further ruled, however, that Valenti's methodology was sufficiently reliable that he could give an opinion that it was at least "more likely than not" that the bullet and casings came from the guns in question.

If a court were to permit the expert to testify as to a "science" that resulted in a "match," the scope of a defense response would also require litigation. Under the seminal holding in *Ake v. Oklahoma*⁴, the indigent defendant is entitled to reasonable funds for expert assistance.⁵ Courts will have to decide whether this entitles an accused to an expert who can attack individualization testimony. As well, the admissibility of the NAS report, as a government report⁶ and/or as a learned treatise for cross-examination of the government expert.

In a Frye Jurisdiction: While many of the issues in a Frye state parallel those listed above, there are different threshold considerations. Frye courts examine whether the discipline or science has met with "general acceptance," a standard that finds reliability in the accepted use of a practice rather than by examining its foundational bases. The fundamental questions that Frye courts will have to decide are:

- Whether a court may revisit the issue of general acceptance for a discipline that has been deemed "accepted" for years or decades?⁷
- Are fingerprints or similar disciplines actually "science" and thus subject to Frye assessment?
- Should Frye permit revisiting of the admissibility question, who is in the relevant community to judge acceptance - all

fingerprint experts, or the broader forensic science research community?

Again, once these fundamental issues are addressed, issues of the scope of such testimony, the application of Rule 403 principles, the nature of rebuttal evidence, the use of the NAS report, and the problem of financial resources for the indigent defendant will all have to be addressed.

The Special Problem of Capital Cases: Many members of the United States Supreme Court have iterated that “death is different.” What is clear is that decisional law of that Court imposes a “heightened reliability” standard in capital cases. As the Court stated in 1976,

the penalty of death is qualitatively different from a sentence of imprisonment...Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.⁸

While that language is arguably directed toward the punishment determination, that decision is in many ways inseparable from the guilt-innocence determination. Forensics evidence can address identity (is this defendant the killer) and/or role in the offense (which defendant fired more shots, or is otherwise more blameworthy). Clearly, the language calling for heightened reliability will be employed by capital case litigators to press for exclusion or limits on forensic evidence; and in Frye jurisdictions, the argument will be made that this Eighth Amendment demand for reliability ‘trumps’ Frye’s “general acceptance.”

In sum, the call to arms that the NAS Report directed to the forensic science community is also a call to judges, prosecutors and defense counsel to re-examine foundational issues on the reliability, admissibility and scope of forensic evidence (other than DNA).

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End Notes:

• Jules Epstein, Jules Epstein is Associate Professor of Law at Widener University School of Law (Delaware). He has written and lectured on forensics-related issues, and was one of the presenters at the 2009 training for capital case litigators sponsored by NCSTL and the Bureau of Justice Assistance, where he spoke about the implications of the NAS Report.

¹ The NAS Report remarks extensively on the lack of standardization and certification:

The fragmentation problem is compounded because operational principles and procedures for many forensic science disciplines are not standardized or embraced, either between or within jurisdictions. There is no uniformity in the certification of forensic practitioners, or in the accreditation of crime laboratories. Indeed, most jurisdictions do not require forensic practitioners to be certified, and most forensic science disciplines have no mandatory certification programs.

NAS Report, pp. S-4-5.

² Rule 403 principles allow a judge to exclude or narrow testimony that is unfairly prejudicial or likely to lead to juror confusion. Rule 403, Fed. R. Evid.

³ 578 F. Supp. 2d 567, 568 569 (S.D.N.Y. 2008).

⁴ 105 S.Ct. 1087 (U.S. 1985).

⁵ See, e.g., Giannelli, “The Right to Defense Experts,” 18 Criminal Justice 15 (Summer 2003).

⁶ Rule 803(8) of the Federal Rules of Evidence allows certain government reports to be admitted at trial for the truth of their contents.

⁷ See, e.g., *Armstead v. State*, 342 Md. 38 (1996) (“due process considerations require trial court to act, as guided by legal precedent, when science reveals that previously accepted methods are not reliable”); Simon Cole, *Out of the Daubert Fire and into the Fryeing Pan? Self-Validation, Meta-Expertise and the Admissibility of Latent Print Evidence in Frye Jurisdictions*, 9 Minn. J.L. Sci. & Tech. 453 (2008).

⁸ *Woodson v. North Carolina*, 428 U.S. 280, 305 (U.S. 1976).



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